

EMPLOYEE STATUS DETERMINATION

Metro-North Commuter Railroad Company

Survey Technicians and Supervisors,

Service Analysts, Revenue Control Specialists

This is the determination of the Railroad Retirement Board concerning the status as employees under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) of individuals performing services as Survey Technicians and Supervisors, Service Analysts, and Revenue Control Specialists for Metro-North Commuter Railroad Company.

Information regarding the employees in question was provided by Anthony Bombace of the Metro-North Purchasing Department. Metro-North entered into a contract effective January 1, 1996, with Progressive Personnel Resources, Inc., based on competitive bidding, for the provision of services as mentioned above. This contract replaces a similar contract effective October 1, 1992, through September 30, 1995, with Contemporary Personnel Services, Inc. The current contract provides that requests for service shall be made by Metro-North's Project Manager; travel time or cost to or from the work site will not be compensated by Metro-North; prior to starting performance of services, the contractor is required to notify Metro-North with the names of the individuals, and Metro-North may require resumes or other information regarding the individuals. Metro-North pays a fee of 22 percent of cost. Progressive Personnel Resources provides health benefits for the individuals involved. The work involved is described below.

1.

Survey technicians are part-time, temporary workers who count passengers and distribute survey questionnaires on trains and at stations. Counts are conducted by mechanical hand tally counters provided by Metro-North staff. Specific work assignments include: counts at Grand Central Station, at outlying stations, and on trains, and distribution of survey questionnaires. The work is seasonal, and specific work hours vary in duration, including early morning and late evening shifts as well as weekend work. The survey technicians are paid \$7.50 per hour.

2.

Supervisors are part-time, temporary workers who supervise the work conducted by Survey Technicians. They also serve as liaison with Metro-North staff. Specific work assignments include: distributing work assignments and counters; verifying data;

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scheduling and conducting spot-checks of Survey Technician counts; and ascertaining which survey groups may need assistance; and may include driving and or picking up Survey Technicians. As with the Survey Technicians, the work is seasonal, and specific work hours vary in duration, including early morning and late evening shifts as well as weekend work. The supervisors are paid \$9.50 per hour.

3.

Service Analysts are part-time, temporary workers who help analyze the work conducted by Survey Technicians. Specific work assignments include: entering of count data onto a PC; assisting Metro-North staff in analysis and reporting of data, including preparing reports; verifying count data; assisting in the record-keeping of Survey Technicians and Supervisors; occasionally organizing survey questionnaires to be distributed sequentially; occasionally assisting other departments in various special projects; and occasionally assisting with the weekly scheduling of Survey Technicians and Supervisors. As with Survey Technicians and Supervisors, the work is seasonal, and specific work hours vary in duration, including early morning and late evening shifts as well as weekend work. The solicitation contemplated that the amount of work throughout the year would average 20 hours per week. The Service Analysts are paid \$13.00 per hour.

4.

Revenue Control Specialists are part-time, temporary workers who purchase duplex tickets on trains to ensure that the correct fares are charged, that proper procedures are used, and that fares collected are remitted to Metro-North. They are also required to purchase tickets at ticket windows, record the information on a revenue control report, present the ticket on the train for payment, and observe the ticket being cancelled. They are to record information on the performance of personnel on board the train and the condition of the trains and stations which they observe. The solicitation contemplated that the amount of work throughout the year would average 90-100 total hours per week. The Revenue Control Specialists are paid \$10.50 per hour.

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Section 1(b) of the Railroad Retirement Act and section 1(d) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. Section 1(d)(1) of the Railroad Retirement Act further defines an individual as "in the service of an employer" when:

(i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and

(ii) he renders such service for compensation * *

*.

Section 1(e) of the Railroad Unemployment Insurance Act contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the Railroad Retirement Tax Act (26 U.S.C. §§ 3231(b) and (d)).

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of the work but also with regard to the way the work is performed.

Under the contract, the Survey Technicians appear to have no direct contact with Metro-North personnel. In none of the four categories can it be said that Metro-North personnel supervise the personnel involved. Indeed, with regard to the Survey Technicians, Supervisors, and Service Analysts, those individuals are working together, submitting instructions down the line and information back up the line to produce reports for Metro-North.

Accordingly, with regard to the Survey Technicians, Supervisors, and Revenue Control Specialists, the Board finds that the control test in paragraph (A) is not met. With regard to the Service Analysts, a majority of the Board finds that the control test in paragraph (A) is not met.

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The tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and would hold an individual a covered employee if that employee is integrated into the railroad's operations even though the control test in paragraph (A) is not met. Under an Eighth Circuit decision consistently followed by the Board, these tests do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business. See Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953).

Under Kelm the question remaining to be answered is whether Progressive Personnel Resources is an independent contractor. Courts have faced similar considerations when determining the independence of a contractor for purposes of liability of a company to withhold income taxes under the Internal Revenue Code (26 U.S.C. § 3401(c)). In these cases, the courts have noted such factors as whether the contractor has a significant investment in facilities and whether the contractor has any opportunity for profit or loss; e.g., Aparacor, Inc. v. United States, 556 F. 2d 1004 (Ct. Cl., 1977), at 1012; and whether the contractor engages in a recognized trade; e.g., Lanigan Storage & Van Co. v. United States, 389 F. 2d 337 (6th Cir., 1968, at 341.

The evidence of record establishes that Progressive Personnel Resources is in the business of providing services to many customers, and is engaged in a recognized trade or business. Accordingly, it is determined that Progressive Personnel Resources is an independent business.

Therefore, the Board concludes that service performed by the Survey Technicians, Supervisors, and Revenue Control Specialists of Progressive Personnel Resources for Metro-North is not covered under the Acts. A majority of the Board concludes that service performed by the Service Analysts of Progressive Personnel Resources for Metro-North is not covered under the Acts.

Glen L. Bower

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(Dissenting

V. M. Speakman, Jr.
in part)

Jerome F. Kever

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22 January 1997

Steve & Marguerite -

The only changes I made are in the marked portions of the double-spaced part of the document.

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